**LIAW KWAI WAH & ANOR.**

**v.**

**PUBLIC PROSECUTOR**

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CRIMINAL APPLICATION NO. 12 OF 1986]
24 NOVEMBER 1986

***CRIMINAL LAW AND PROCEDURE:*** *Reference under s. 66(1) of the Courts of Judicature Act 1964 - For determination by the Supreme Court of question of law of public interest - Power of revision of High Court Judge - Principles - when such power is to be used.*

This was a reference under s. 66(1) of the Courts of Judicature Act 1964 for the determination by the Supreme Court of the following questions of law of public interest, *viz.*

(1) Whether the High Court was right in ruling that after the execution of whipping the Court has the power to increase the number of stroke.

(2) Whether or not the High Court ought to give ample time to the accused to engage Counsel to prepare for his case in the event that the case is called up for revision by the Judge.

The applicants were charged in the Magistrate's Court, Petaling Jaya, for robbery under s. 397 of the Penal Code. The charge was that on 17 December 1985 they had robbed one Ng Char Hoe of a car and some other articles. At the time of the commission of the offence they were armed with knives.

The applicants pleaded guilty and were convicted. The Magistrate imposed two years' imprisonment and one stroke of rattan on each of them. The sentence of whipping was carried out three months after the date of the sentence.

There was no appeal against the sentence by either of the applicants nor by the Public Prosecutor. However, on 27 September 1986 the applicants were summoned by the High Court to appear before it for a revision. The learned Judge enhanced the sentence of imprisonment on each applicant to five years and the sentence of whipping to five strokes.

The applicants now ask this Court to determine whether the High Court had the power to increase the strokes after the sentence of whipping imposed by the Magistrate's Court had already been executed. They also ask the Court to determine whether it was their right to be given time to engage Counsel to defend them.

**Held:**

**[1]** The short issue in the instant case that arises is whether the learned Judge had exercised the power of revision within the limits and in the spirit of the provisions of the Criminal Procedure Code ("the Code") which relate to the sentence of whipping. The Code clearly prohibits whipping to be executed in instalments. Thus, by imposing additional strokes after a sentence of whipping by a lower Court had already been executed, it necessarily means that such strokes shall have to be further executed. Indeed, the whipping shall have to be inflicted on two separate occasions and therefore in two instalments. In such a case, it is clearly improper for a Judge to exercise his revisionary power to impose additional strokes. He would under those circumstances be acting contrary to law.

**[2]** A Judge may use the power of revision to increase a sentence only in exceptional cases. He is not assume the role of a Public Prosecutor. The law is clear in that the Public Prosecutor is vested with a right to appeal against any sentence which he feels is manifestly inadequate. The power of revision is therefore to be used sparingly and should remain a discretionary power to be exercised primarily for purposes of correcting a miscarriage of justice.

**[3]** The answer to the first question was therefore in the negative. Their Lordships accordingly quashed the additional whipping imposed by the learned Judge on each of the applicants.

**[4]** With respect to the second question, their Lordships did not propose to answer it.

*[Order accordingly.]*

**Cases referred to:**
*Emperor v. Nasrullah & Others [1928] AIR All 287*
*Chettiyar v. Ayyar IRC 47 Mad 722*
*R. v. Lachiram ILR 28 Bom 533*
*Re Soo Leot [1956] MLJ 54*
*Re Radha Krishna Naidu [1962] MLJ 130*

**Legislation referred to:**
Courts of Judicature Act 1964, ss. 31, 36, 66(1)
Criminal Procedure Code, ss. 255, 311, 315, 316, 316(b), 317, 323(i), 325(i), (ii)
Federal Constitution, art. 5(3)
Penal Code, s. 397

**Other sources referred to:**
*Words & Phrases Legally Defined,* 2nd Edn., vol. 2, p. 82
*The Interpretation of Statutes,* Maxwell, 12th Edn., pp. 147-8

*For the applicants - Ngeow Yin Ngee; M/s. Ngeow & Maurice Gomes*
*For the respondent - B. Sarala Pillai, DPP*

**JUDGMENT**

**Abdul Hamid Omar CJ (Malaya):**

This is a reference under s. 66(1) of the Courts of Judicature Act 1964 for the determination by the Supreme Court of the following questions of law of public interest, viz.

(1) Whether the High Court was right in ruling that after the execution of whipping the Court has the power to increase the number of stroke.

(2) Whether or not the High Court ought to give ample time to the accused to engage Counsel to prepare for his case in the event that the case is called up for revision by the Judge.

***Brief facts***

The applicants, Liaw Kwai Wah and Chan Hai Ching, were charged in the Magistrate's Court, Petaling Jaya, for robbery under s. 397 of the Penal Code. The charge was that on 17 December 1985 at about 11.30 p.m., they robbed one Ng Char Hoe of a white Honda car and some other articles. At the time of the commission of the offence they were armed with knives.

On 18 March 1986, the applicants pleaded guilty and were convicted. The Magistrate imposed two years' imprisonment and one stroke of rattan on each of them. The sentence of whipping was carried out three months after the date of the sentence.

There was no appeal against the sentence by either of the applicants nor by the Public Prosecutor. However, on 27 September 1986 the applicants were summoned by the High Court to appear before it for a revision. The learned Judge enhanced the sentence of imprisonment on each applicant to five years and the sentence of whipping to five strokes.

The applicants now ask this Court to determine whether the High Court had the power to increase the strokes after the sentence of whipping imposed by the Magistrate's Court had already been executed. They also ask this Court to determine whether it was their right to be given time to engage Counsel to defend them.

***Power of revision***

Section 31 of the Courts of Judicature Act 1964 confers on the High Court, in respect of criminal proceedings and matters in the subordinate Courts, the powers of revision. And s. 323(i), Criminal Procedure Code (the Code), empowers a Judge to call for and examine the record of any proceeding before any inferior criminal Court for the purpose of satisfying himself as to the correctness,legality or propriety of any finding, sentence, or order recorded or passed ... Section 325 of the Code further provides that in any case, the record of proceedings of which had been called for by the Judge himself or which otherwise comes to his knowledge, the Judge may, in his discretion, exercise any of the powers conferred by ss. 311, 315, 316 and 317 of the Code. Among the powers set out in s. 325(i), Criminal Procedure Code, is the power of the Court to enhance or alter the nature of the sentence imposed (see also s. 316(b) of the Code).

***Object of revision***

We could observe that the power of revision is to be exercised in accordance with the law for the time being in force relating to criminal procedure. In the present case that law is the Criminal Procedure Code. We would also observe that the object of the revisionary powers provided for in the Code is-

> ... to confer upon criminal Courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.
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> *(Emperor v. Nasrullah & Others* [1928] AIR All 287).

It is also clear that the High Court may examine the record of proceedings in the subordinate Courts "wherever it considers that in doing so the purpose of justice will be served, as for example, when the record discloses no offence or when the accused is subjected to a vexatious and groundless prosecution." (*Chettiyar v. Ayyar* IRC 47 Mad 722).

***Duty of High Court***

Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior Court.

The Judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court. Where, for instance, a convicted person has scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the Judge ought to call for and examine the record with a view to exercising the revisionary power to correct a miscarriage of justice.

***Power is discretionary***

The High Court's power sitting in revision is discretionary. As it is, it must therefore be exercised judicially and within the limits and in the spirit of the legislation. "Discretion" is defined in the *Words and Phrases Legally Defined*, 2nd Edn., Vol. 2, at p. 82 to read:

> 'Discretion' means that when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's* Case [1598] 5 Co. Rep. 996); according to law, and not humour. It is to be, not arbitrary, vague, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself: *Wilson v. Rastall* [1792] 4 Term Rep. at p. 757)." *(Sharp v. Wakefield* [1891] AC 173, HL, per Lord Halsbury LC at p. 179.)

Maxwell on the *Interpretation of Statutes*, 12th Edn., at pp. 147 - 8, under the Heading "The exercise of discretions must be reasonable", states that-

> Even though an act done is ostensibly in execution of a statutory power and within its letter, it will nevertheless be held not to come within the power if done otherwise than honestly and within the spirit of the enactment. A discretion is to be 'regulated according to known rules of law.' *(Lee v. Bude & Torrington Junction Ry. Co.* [1871] LR 6 CP 576, per Willes J at pp. 580, 581), and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet ... 'It is true,' said Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223 at p. 229), 'the discretion must be exercised reasonably'.

The principles which should guide the Courts in the exercise of the revisionary powers have been clearly set out by Jenkins CJ in *R. v. Lachiram* ILR 28 Bom 533. In that case his Lordship said that

> this controlling power of the Court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly.

In *Re Soo Leot* [1956] MLJ 54, Buhagiar J following the principles laid down by Jenkins CJ in *R. v. Lachiram supra,* held that

> the powers of the High Court in revision are exercisable at the discretion of the Court and that discretion is untrammelled and free, so as to be fairly exercised according to the exigencies of each case.

***Questions in issue***

In the instant case, the short issue that arises is whether the learned Judge had exercised the power of revision within the limits and in the spirit of the provisions of the Code which relate to the sentence of whipping. The Code clearly prohibits whipping to be executed in instalments. Thus, by imposing additional strokes after a sentence of whipping by a lower Court had already been executed, it necessarily means that such strokes shall have to be further executed. Indeed, the whipping shall have to be inflicted on two separate occasions and therefore in two instalments. In such a case, it is clearly improper for a Judge to exercise his revisionary power to impose additional strokes. He would under those circumstances be acting contrary to law.

At this point we wish to observe that a Judge may use the power of revision to increase a sentence only in exceptional cases. He is not to assume the role of a Public Prosecutor. The law is clear in that the Public Prosecutor is vested with a right to appeal against any sentence which he feels is manifestly inadequate. The power of revision is therefore to be used sparingly

and should remain a discretionary power to be exercised primarily for purposes of correcting a miscarriage of justice. (see the observation of Hepworth J in *Re Radha Krishna Naidu* [1962] MLJ 130). Coming back to the question in issue, the answer to the first question is therefore in the negative. In the light of our answer to this question, we accordingly quash the additional whipping imposed by the learned Judge on each of the applicants.

With respect to the second question, we do not propose to answer it. The record does not show that the applicants had applied for an adjournment to engage a Counsel. Be that as it may, we wish to observe that there is adequate protection for the accused in such matter as evident by sub-section (ii) of s. 325 of the Code. Section 325(ii) states that -

> No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

The above protection is further reinforced by the proviso to s. 36 of the Courts of Judicature Act 1964 which prohibits a final order from being made "to the prejudice of any person unless the person has had an opportunity of being so heard."

In this regard, it is also useful to bear in mind the provision of s. 255 of the Code which confers a right on every person accused before any criminal Court to be defended by an advocate.

All these provisions are, in our view, consistent with the fundamental liberty as enshrined in the Constitution that a person arrested be allowed to consult and be defended by a legal practitioner of his choice (Federal Constitution Article 5(3)).

Thus, subject to certain legal restrictions, a prisoner should be afforded an opportunity of access to proper legal advice without which the interest of justice would clearly be defeated.

Also found at [1987] 1 CLJ 35